IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
ANDREW BRINER	:	NO. 05-64
DEAN HODGES	:	
DANIEL MULLEN	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **DECEMBER 6, 2005**

On June 24, 2005, after nine days of trial, a jury convicted Andrew Briner, Dean Hodges and Daniel Mullen on ten counts of smuggling, in violation of 18 U.S.C. § 545 (Counts 2 through 11); ten counts of importing merchandise through false and fraudulent practices, in violation of 18 U.S.C. § 542 (Counts 12 through 21); four counts of wholesale distribution of prescription drugs without a state license, in violation of 21 U.S.C. §§ 331(t), 333(b), and 353 (Counts 22 through 25); five counts of selling unapproved drugs, in violation of 21 U.S.C. §§ 331(d), 333(a), and 355 (Counts 26 through 30); and one count of conspiracy to commit these crimes, in violation of 18 U.S.C. § 371. The jury acquitted defendants on the knowledge or intent elements of the FDA charges (Counts 22 through 30), so that these convictions are for misdemeanor offenses.

Presently before the Court are the defendants' motions for judgment of acquittal and new trial.[1]

The evidence at trial established that in 2003 the three defendants and Clark

[1]All defendants were granted leave to join in the motions filed by co-defendants.

Bowers were partners in a business which was to import oncology drugs and sell these drugs to physicians. They had two customers, Dr. Vivacqua, who had a practice at Crozier-Chester Hospital and Dr. Sprandio, who had a practice at Delaware County Memorial Hospital. Because of the nature of these medical practices, they used large quantities of drugs and the drugs had to be administered at the physicians' offices under the physicians' supervision.

These practices dispensed an enormous amount of drugs in the course of a year, e.g., Dr. Sprandio's Office Manager stated that it would amount to $10,000,000 to $12,000,000 a year on oncology medications. The doctors would order the drugs from Pharmaceuticals Limited. These orders would go to Pharmaceuticals Limited's office in the Isle of Man and to Kays Medical in Liverpool, England. Kays Medical would fill the orders and mail the drugs to the United States. This distribution took two different forms. Dr. Vivacqua received his drugs directly from England. They were addressed to the patient at Dr. Vivacqua's office address. Because of prior inquiries by the FDA Dr. Sprandio did not want drugs sent directly to him. His drug orders were sent to an automobile garage in Glenolden, Pennsylvania, run by a friend of defendant Briner. These packages would then be picked up and taken to a gas station owned and operated by Briner where he maintained an office. An employee would check the contents of the packages and then deliver them to Dr. Sprandio's office. The employee would then shred the packaging slips and the boxes.

Because of the potentially unreliable nature of the mailing system the defendants developed and maintained a stockpile of the drugs in order to insure a constant flow to the doctors. This stockpile was kept at Briner's garage/office. They were able to get the drugs for the stockpile by resubmitting to Kays Medical orders that had already been filled.

This investigation and prosecution came about as a result of information given to the authorities by Clark Bowers.

MOTION FOR JUDGMENT OF ACQUITTAL

Defendants contend that the jury lacked evidence on which to base a finding that they were importing prescription drugs illegally and that they were using false and fraudulent practices to do so.

The jury heard the following evidence which this Court finds sufficient to support a finding that a Customs declaration had to go on the outside of their shipments and that they fraudulently and willfully arranged for their shipments not to have those Customs declarations.

In November of 2002, a shipment of 370 boxes, valued at over $72,000, was interdicted at Customs as it entered the United States at the Miami International Airport. Customs referred the matter to FDA Compliance Officer Raymond Lyn. Mr. Lyn had a conversation with defendants Hodges and Mullen about the FDA's Personal Importation Policy ("PIP") and how the defendants' imports did not meet its requirements. Mr. Lyn refused entry to those 370 boxes of drugs because they could not legally enter the United States. N.T. 6/14/05, pp. 189-208. Lyn further testified that they tried to explain to Lyn that the products do meet the personal importation policy and should be released from Customs. Id. p. 214. Lyn went on to testify, "Skip said entry did meet the PIP rule and was a little upset." And again Lyn explained the PIP policy. He went on to testify "when I tried to ask questions about the firm. I was challenged there, and they wouldn't provide that type of information." Id. p. 215.

Clark Bowers was a pharmacist with 20 years experience in international pharmacy. N.T. 6/17/05 p. 4. He was a full partner with the three defendants in this case. Id. p.

5. Bowers testified that after the telephone call with Lyn where Lyn told them that what they were doing was illegal, a later discussion with the partners was to the effect that "we're going to have to find a better way to get around this. It was this isn't going to work this way because the FDA is looking at this as not personal use and its for re-sale." Id. p. 38. After the problem the defendants had with Mr. Lyn, Bowers went on to testify "what we decided to do was that we had to find a new way to go undercover more so that we wouldn't be dealing with the FDA or Customs." Id. p. 41. Bowers went on to testify, "yes, well we decided that the best alternative was to send these packages or to send the medications to doctors by direct mail and without going through Customs declaration in the United Kingdom. Then we would not have to deal with Customs in this country." Id. p. 42.

Clark Bowers did not attend an April 2, 2003 meeting with the defendants and their attorney Mr. Famiglio, but, he did take part in outlining the issues to be discussed with Famiglio at that meeting. After testifying that defendants Briner, Hodges and Mullen took part in outlining the issues he stated at trial:

> "Q. All right, and going into that meeting what was your understanding about whether it was legal to have a package sent from the United Kingdom to the United States without a customs declaration?
>
> A. That it's illegal.
>
> Q. Was the fact that you thought it was illegal discussed within the group?
>
> A. Yes, and it was how we wouldn't get caught."

Id. pp. 42-43.

In an effort to avoid the scrutiny of Customs and the FDA the defendants gave directions to their supplier in Liverpool to send the drugs via regular mail, in plain brown boxes,

with postage only (a postage meter could be traced), and without any Customs declaration. The delivery address for one medical practice was the practice itself. The delivery address for the other was a garage unaffiliated with Pharmaceuticals Limited operated by a friend of defendant Briner who was paid per box to accept these shipments. See Exhibit 153.

Defendant Mullen contacted Dennis Colgan in May of 2002, seeking his assistance with the business efforts of Pharmaceuticals Limited. Mr. Colgan is CEO/COO/President of Barthco, a major import logistics company. N.T. 6/15/05 p. 14. Mr. Colgan reviewed the business plan Mullen submitted, consulted with a Barthco expert, and advised Mullen that Mullen could not proceed with that kind of business. Id. p. 22-23. On December 3, 2002, at the instigation of Mullen, Mr. Colgan met at Barthco's offices with three Barthco officials, defendant Mullen and two or three of Mullen's business partners. Id. pp. 23-25. Barthco representatives again reviewed defendants' plans, and Mr. Colgan referred Mr. Mullen and his partners to an attorney in New York, Frank Desiderio, a Customs expert. Id. pp. 31-33. On December 28, 2002, Mullen wrote to Colgan advising Colgan that Desiderio had approved defendants' business plan, misrepresenting the advice he had obtained from that expert attorney Desiderio. Id. pp. 32-34, 45-51.

Several months later, in 2003, Mullen invited Colgan to meet at defendants' Country Club with up to five other people. At that time the discussion again centered on difficulties with the operation of Pharmaceuticals Limited. Id. pp. 35-39. They discussed the various mailing options such as FedEx, freight forwarder or commercial shipper or the regular mail system. Mr. Colgan noted that Customs had the right to stop all these shipments and ask questions. He further testified:

> "I explained that the mail was the least reliable service and that most commercial operations or anyone that really has to depend on something would be taking a certain risk in using mail without any traceability or anything on the situation. And, that while the packages are examined, they're examined at a very low frequency. But that you do have to place on the outside of the package a declaration that shows the nature of what's in the package and the value. And, then of course, the actual invoice can be on the interior."

Id. p. 37

Although, at the time of trial, Mr. Colgan on cross-examination was not as certain of this requirement, there was no evidence that his uncertainty was ever expressed to defendants. Id. pp. 50-51.

The jury heard from Mr. Colgan that he advised Mullen and up to five other people associated with him that a declaration had to go on the outside of every package. The jury heard the testimony of Clark Bowers that the group wanted to avoid Customs, and the way to avoid Customs was to not put a Customs declaration on the outside of the package when it was sent from the United Kingdom to the United States. The jury had the opportunity to see Exhibit 153, which instructed the English shipper in part, "Ship via air mail. Do not declare, register or certify packages with UK Post. Simply place proper postage (stamps) on each package and drop in UK Post."

The jury also heard the tape recorded conversations of the defendants discussing this and the fact that the use of postage stamps instead of postage meters would prevent tracing of ownership of the package. These recorded conversations leave no doubt that the defendants knew that what they were doing was illegal, that they knew they had to attach a declaration on the outside of the package and if they did that then Customs would investigate what was in the

package and they wanted to avoid that at all costs.

Defendants also argue in their supplemental memorandum filed by Dean Hodges that they lacked knowledge based on the advice of their counsel Robert Famiglia. The Court instructed the jury on the "advice of counsel defense" and the defendants do not challenge the accuracy of the Court's instruction on that point. We told the jury it was an issue for them to determine and the jury obviously rejected that defense.

Defendants Briner and Hodges also contend that the jury did not have sufficient evidence to find that they knew of the Customs declaration requirement as opposed to defendant Mullen.[2] It was clear from Clark Bowers' testimony that all of the defendants discussed the illegality together and in fact made all the business decisions together. Also, Mr. Colgan testified that he met with two or three of Mullen's partners on December 3, 2002 and with up to five of Mullen's associates at the Country Club later, where he specifically told them that a Customs declaration had to be attached to the outside of the packages. This allegation is therefore denied.

We find that the jury had sufficient evidence to convict each of the defendants of the Customs charges.

The defendants also argue that the regulation in question, in fact, did not require a Customs declaration on the outside of their shipments or at least that this requirement was ambiguous.

The regulation in question provides:

> (a) Customs declaration. A clear and complete Customs declaration on the form provided by the foreign post office, giving a full and accurate description of the contents and value of the merchandise,

[2]Mullen worked in the shipping business for many years.

> shall be securely attached to at least one mail article of each shipment . . . . Although a Customs declaration is required to be attached to only one mail article or each shipment, examination and release of the merchandise will be expedited if such a declaration is attached to each individual mail article.

19 C.F.R. § 145.11 (Declarations of value and invoices).

The words "attached to" do not mean "in" to the ordinary reader. Furthermore, when we consider those words in the context of this regulation it is even more obvious.

> "A clear and complete customs declaration . . ., giving a full and accurate description of the contents" . . . .

If the shipper could place the declaration inside the package a Customs official would have to open the package to see the declaration. At that point the Customs official could view the contents, what need would he have for the "full and accurate description of the contents."

Defendants' interpretation of this paragraph becomes even more unreasonable when we consider the additional provision in the regulation that allows the declaration to be "securely attached to at least <u>one</u> mail article of each shipment". When we apply this language to the defendants' shipment of drugs in November 2002 which contained 370 boxes, defendants' interpretation of the regulations would allow the one declaration to be placed in one of the 370 boxes. We would then expect the Customs official to go find it.

For the foregoing reasons I find that the regulation required that the Customs declaration be placed on the outside of the mailed article and that the regulation is not ambiguous.

MOTION FOR NEW TRIAL

<u>Jury Instruction - Deference to Customs' Interpretation of its own Regulations</u>

Pursuant to the government's request, at the end of the jury charge, I added the following instruction, "[i]t is the job of the . . . government agency to interpret its own regulations and the statutes that Congress has directed it to administer. The agency's interpretations of those regulations and statutes are entitled to deference." (N.T. 6/23/05, p. 51).

In their Motion for a New Trial, Defendants argue that the submission of this instruction to the jury constituted plain error. Defendants assert that in criminal cases, administrative regulations, like criminal statutes, are subject to strict scrutiny; therefore, Customs' interpretation of 19 C.F.R. § 145.11 is not entitled to deference.[3] Moreover, defendants argue that the jury instruction affected their substantial rights because there is a reasonable likelihood that it caused the jury to defer to Customs' interpretation of 19 C.F.R. § 145.11 that a declaration must be attached to the outside of mail articles. Defendants go on to assert that the jury instruction affected the fairness, integrity and public reputation of the trial because a conviction based on an erroneous charge taints the reputation of the judicial process.

The government argues that the jury instruction was not error. However, assuming that it was an error, the government asserts that it did not seriously affect the fairness, integrity or

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[3] 19 C.F.R. § 145.11 provides:

> (a) Customs declaration. A clear and complete Customs declaration on the form provided by the foreign post office, giving a full and accurate description of the contents and value of the merchandise, shall be securely attached to at least one mail article of each shipment . . . . Although a Customs declaration is required to be attached to only one mail article or each shipment, examination and release of the merchandise will be expedited if such a declaration is attached to each individual mail article.

19 C.F.R. § 145.11 (Declarations of Value and Invoices).

public reputation of the proceedings. Thus, the government argues that the jury instruction does not rise to the level of injustice needed to support a new trial. After analysis of defendants' claim, I find that a new trial is not warranted.

Since defendants did not object to the jury instruction at trial, the instruction is reviewed for plain error. United States v. Guadalupe, 402 F.3d 409, 410 n.1 (3d Cir. 2005). "It is the defendant's burden to establish plain error." Id. (citing United States v. Olano, 507 U.S. 725, 734-735 (1993)). In order to establish plain error, a defendant "must prove that: (1) the court erred; (2) the error was obvious under the law at the time of review; and (3) the error affected substantial rights - the outcome of the proceeding." Id. (citing Johnson v. United States, 520 U.S. 461, 467 (1997)). "If all three elements are established, the court may, but need not, exercise its discretion to award relief if the error affects the fairness, integrity or public perception of the proceedings." Id. (citation omitted).

Defendants' claim fails because they cannot show that the instruction directing the jury to defer to an agency's interpretations of regulations and statutes affected their substantial rights - the outcome of the trial. Defendants argue that the jury instruction affected their substantial rights because there is a reasonable likelihood that it caused the jury to defer to Customs' interpretation of 19 C.F.R. § 145.11 that a declaration must be attached to the outside of mail articles. The premise for defendants' argument is that Customs incorrectly interpreted 19 C.F.R. § 145.11 by requiring that a Customs declaration must be attached to the outside of mail articles. However, as I previously concluded during trial and in this Memorandum Opinion, 19 C.F.R. § 145.11 does indeed require that a Customs declaration be attached to the outside of mail

articles.[4]

During trial, I concluded, and instructed the jury accordingly, that the plain language of 19 C.F.R. § 145.11 requires that the Customs declaration be placed on the outside of the mailed article. Likewise, Customs official Raymond Zizzo testified that 19 C.F.R. § 145.11 requires that the Customs declaration be placed on the outside of the mailed article.
Upon post-trial review of this issue, I again reviewed 19 C.F.R. § 145.11 finding that the regulation unambiguously requires that the Customs declaration be placed on the outside of the mailed article.

In light of the above, defendants fail to show how their substantial rights were affected by the reasonable likelihood that the jury instruction caused the jury to defer to Customs' interpretation of 19 C.F.R. § 145.11 that a declaration must be attached to the outside of mail articles. As a result, defendants have not made any showing how the jury instruction regarding deference to an agency's interpretations of regulations and statutes affected their substantial rights, in other words, had any affect on the outcome of their trial. Consequently, defendants fail to establish that the jury instruction was plain error.

Furthermore, even if defendants did successfully establish plain error, they fail to show that relief is warranted. They fail to make, and cannot make, any showing that the jury instruction affected the fairness, integrity or public perception of the proceedings. In light of the aforementioned, defendants' claim for a new trial fails as a matter of law.

Jury Instruction on Reasonable Doubt

[4] I previously concluded that 19 C.F.R. § 145.11 required that the Customs declaration be placed on the outside of the mailed article and that the regulation is not ambiguous. *See* p. 8.

Defendants contend that we committed error requiring a new trial when we instructed the jury on reasonable doubt. The instruction given was as follows (with the phrase sought by defendants in bold type):

> Throughout this, we've mentioned the term proof beyond a reasonable doubt, that the burden is always on the government to prove each and every element of each crime charged beyond a reasonable doubt and this burden never shifts. Proof beyond a reasonable doubt is proof that you - - leaves you firmly convinced of a defendant's guilt.
>
> The expression reasonable doubt means a doubt which is founded upon good reason. It must not arise from a merciful disposition or a kindly or sympathetic feeling or a desire to avoid the performance of a disagreeable or unpleasant duty. If a reasonable doubt arises, it must be either from the evidence produced or from the lack of evidence produced. It must not be a mere whim, speculation[,] a vague or hypothetical conjecture or a misgiving founded upon mere possibilities, it is the kind of doubt that would make a reasonable person hesitate to act **[in a matter of importance in that person's own personal affairs].** The government is not required to prove guilt absolutely or beyond all possible doubt or to a mathematical certainty. It is not necessary that you be convinced to an absolute certainty that a defendant is guilty.

N.T. 6/22/05, pp. 39-40.

The words suggested by the defendants are merely another descriptive method of illustrating the kind of doubt needed to convict. The absence of these words does not lessen the burden on the government, the absence of those words merely removes an alternative description of the burden placed on the government.

The cases cited by the defense on this point are cases in which the courts approved charges in which the suggested phrase is used, but none <u>required</u> that phrase to be used. In none of those cases was the phrase in question the central issue in dispute.

As the Third Circuit Court of Appeals stated in the case of United States v. Isaac, 134 F.3d 199, 202-203 (1998):

> The Constitution requires that the government prove every element of criminal charge beyond a reasonable doubt to obtain a conviction. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). While a trial court must advise the jury of the government's burden of proof, no particular set of words is mandated. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1243, 127 L.Ed.2d 583 (1994). Due Process is satisfied if the instructions, taken as a whole accurately convey the concept of reasonable doubt to the jury. *Id.* (Citing *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954)). Thus, although we have considered each of Isaac's criticisms, ultimately we must determine whether the entire instruction the jury received led it to apply the correct standard of proof. If not, Isaac's conviction will be reversed. *Sullivan v. Louisiana*, 508 U.S. 275, 279080, 113 S.Ct. 2078, 2081-82, 124 L.Ed.2d 182 (1993).

Taken as a whole I conclude that the charge properly instructed the jury as to the burden of proof imposed upon the government in a criminal case.

Jury Instructions - Wholesale Distribution Counts

Defendants contend that the Court committed error in its charge on the wholesale distribution crime, 21 U.S.C. §§ 331(t), 333(b) and 353 (Counts 22 through 25). Under the Federal Food, Drug and Cosmetic Act (FDCA) it is a crime to engage in "wholesale distribution" in interstate commerce unless the distributor has the proper state wholesaler license. The FDCA defines "wholesale distribution" as "distribution of [prescription] drugs to other than the consumer or patient." 21 U.S.C. § 353(e)(3)(B). Defendants contend that we committed error when we instructed the jury as follows:

> The United States Code states that no person may engage in the wholesale distribution in interstate commerce of prescription drugs in a state unless such person is licensed by the state in accordance with certain guidelines.

> The Code defines wholesale distribution. Wholesale distribution, as it defines it [is] distributing prescription drugs to anyone other than consumer or patient. . . .
>
> As I've indicated, the law defines wholesale distribution of prescription drugs as distributing prescription drugs to any person other than the consumer or patient. **For these purposes, the term consumer or patient means the person who ingests, has injected into him or herself or takes the prescription drug, not the doctor who administers the drug.**

N.T. 6/22/05 (jury charge), pp. 30-31 (challenged portion in bold type).

This is nothing more than stating the obvious. The defendants directed the doctors to purchase drugs in the name of individual patients in an attempt to come within what they thought was the FDA's Personal Importation Policy. However, the government presented uncontroverted evidence that the doctors bought the drugs, stocked them in their large in-office pharmacies, and then administered them to patients as needed, not to the particular patients whose names were used to order the drugs. N.T. 6/16/05 pp. 66-67 (testimony of Janet Doherty), p. 103 (testimony of Jacqueline Connor). To illustrate that this was nothing more than a fiction, we repeat here what we said earlier in this Memorandum at page 2 about this procedure:

> The doctors would order the drugs from Pharmaceuticals Limited. These orders would go to Pharmaceuticals Limited's office in the Isle of Man and to Kays Medical in Liverpool, England. Kays Medical would fill the orders and mail the drugs to the United States. This distribution took two different forms. Dr. Vivacqua received his drugs directly from England. They were addressed to the patient at Dr. Vivacqua's office address. Because of prior inquiries by the FDA Dr. Sprandio did not want drugs sent directly to him. His drug orders were sent to an automobile garage in Glenolden, Pennsylvania run by a friend of defendant Briner. These packages would then be picked up and taken to a gas station owned and operated by Briner where he maintained an office. An employee would check the contents of the packages and then deliver them to Dr. Sprandio's office. The employee would then shred the packaging slips and the boxes.

> Because of the potentially unreliable nature of the mailing system the defendants developed and maintained a stockpile of the drugs in order to insure a constant flow to the doctors. This stockpile was kept at Briner's garage/office. They were able to get the drugs for the stockpile by resubmitting to Kays Medical orders that had already been filled.

It is clear from the foregoing, that the distribution was made to the medical practices which placed the drugs in stock to be used for any patient who needed them. These deliveries to doctors' offices by no stretch of the imagination can be considered to be distribution to the patient or consumer for the purposes of the definition of the "wholesale distribution".

Stated another way, the defendants are arguing that because of the nature of these drugs there is no way they could sell them directly to the patient or consumer; therefore, the definition of "patient or consumer" has to be altered to mean doctor. When in fact their reasoning should have been, because of the nature of these drugs, there is no legal way to sell them without a wholesale distribution license.

Evidence Regarding FDA's Personal Importation Policy (PIP)

The defendants contend that this Court erred by permitting the government to introduce evidence that the defendants violated the FDA's Personal Importation Policy when this evidence was irrelevant to the charges set forth in the indictment. It is surprising that the defense would raise this issue at this late date in the proceedings. I believe that the testimony with regard to the PIP policy was relevant for at least three reasons:

1. to prevent its being used as a defense to the charges;

2. to prevent the jury from being confused by incomplete and inaccurate reference to the policy; and

3. to demonstrate for the jury the knowledge the defendants had as to the Customs' laws and FDR regulations, in order to prevent the defendants from claiming among other things that they did not have the mental state required for guilt in this case.

In fact, it appears to the Court, that the defendants attempted to use PIP in all three ways at various stages during the trial.

The government first referenced the Personal Importation Policy in its trial memorandum without any objection from the defense. The government next referred to PIP in its opening statement to the jury, without objection by the defense. N.T. 6/13/05 pp. 25-27 (see also 32-34 where the defense did raise other issues at the close of the government's opening statement.)

Hodges' defense attorney referred to PIP in his opening statement, not for the purpose of telling the jury that it had no application to this case, but to state, "even the FDA was uncertain about what was permitted and what was prohibited by the personal use exemption." (See CD Rom 4:02:20-4:02:50 trial day no. 1)[5]

This statement indicates that counsel was planning to use PIP as a defense but in any event it does not sound as if he was telling the jury that PIP had nothing to do with this case.

Mullen's defense counsel discussed PIP and attorney Famiglia's advice regarding PIP in his opening statement (CD Rom 9:45:30 trial day no. 2) and discussed the history of Pharmaceuticals Limited using PIP citing the requirements of PIP (at CD Rom 9:51:00 trial day no. 2). These statements also indicated that defense counsel was keeping the door to a possible

[5]These references to the CD Rom recording are used because the defendants did not order the Notes of Testimony of defendants' opening statements.

PIP defense open but in any event nothing was said to the jury that sounded as if PIP had nothing to do with this case.

Before any objection was made by the defense, three witnesses testified about PIP and how defendants' practices violated it and were cross-examined by defense counsel on this policy. N.T. 6/14/05 pp. 66-67 (testimony of Neil Pennington; objection by defense only as to foundation and relevance of Dr. Pennington's knowledge); p. 91 (cross-examination of Dr. Pennington; pp. 116, 123, 137-140, 185 (testimony of David Grossman); pp. 166-167, 175-176, 179 (cross-examination of Dr. Grossman); pp. 195-217 (testimony of Raymond Lyn); 6/15/05 pp. 2-33 (cross-examination of Mr. Lyn) pp. 3-10 (re-direct examination of Mr. Lyn). It was not until after the government called Dennis Colgan that defendants objected to testimony regarding the PIP policy.

The testimony as to PIP was not only relevant because it was inextricably bound to much of the defendants' business plan, it also appears that it was part of the defense strategy until Mr. Lyn testified. His testimony clarified PIP so completely that it was obvious to everyone that the defendants' conduct could not come within that policy and defendants therefore could not make use of it at trial as a defense. It was at that point that the defense started to object to testimony with regard to the policy when Dennis Colgan took the witness stand.

PIP was not only relevant for several reasons, any objection to it was waived.

For these reasons the Motions for a New Trial are denied and we enter the following Order.

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DANIEL MULLEN	:	

O R D E R

AND NOW, this 6th day of December, 2005, Defendants' Andrew Briner, Dean Hodges and Daniel Mullen's, Motions for Judgment of Acquittal (Doc. No. 44) and for a New Trial (Doc. No. 45) are hereby **DENIED**.

BY THE COURT:

/s/ Robert F. Kelly
ROBERT F. KELLY
SENIOR JUDGE